Supreme Court of the United States

OCTOBER TERM 1944

No.

UNITED FRUIT COMPANY,

Petitioner,

against

HARRY NEWMAN, FREDERICK BATCHELOR, JUAN URIBE, CRESCENCIO MARTIN, RAMON MOSQUERO, MARIO LEFLER and FRANCISCO MARTINEZ,

Respondents.

BRIEF IN SUPPORT OF THE PETITION

Opinions Below

The opinion of the District Court (R. pp. 18-21) has been reported at 50 F. Supp. 66. The opinion of the Circuit Court of Appeals (R. pp. 36-39) has been reported at 141 F. (2d) 191.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Tit. 28, U. S. C., Sec. 347). The date of the decree of the Circuit Court of Appeals for the Second Circuit to be reviewed was May 23, 1944 (R. p. 39).

Statement of the Case

At Boston, May 27, 1941, petitioner received a telephone message from the Maritime Commission requesting prompt conference in Washington to discuss the question of delivery to the Navy for immediate use of two of its six ships of the *Chiriqui-Quirigua* class. At Washington the following day (May 28) petitioner's representative was advised verbally by the Commission of the President's May 27, 1941, proclamation authorizing it to requisition vessels under Sec. 902 of the Merchant Marine Act, 1936, as amended, for use in the national emergency; that the Navy had requested the Commission to requisition immediately the use of two ships of the *Chiriqui-Quirigua* class; and that the Commission would requisition the use of two of such ships then in the United States (R. p. 13). (The stipulation does not indicate the whereabouts of the *Quirigua*. Actually neither the *Quirigua* nor the *Chiriqui* were in the United States May 27—the *Veragua* being the only one of the six vessels then in port. The *Quirigua* arrived in port May 28, the *Chiriqui* June 1.)

Petitioner's representative pointed out that the *Chiriqui* and the *Quirigua* already were booked with cargo and passengers and that it would be inconvenient and expensive to cancel the passenger reservations and the cargo commitments, notwithstanding which the Navy Department, when advised of this difficulty by the Commission over the telephone, insisted that these two vessels be taken (R. pp. 13-14). Petitioner's representative was then advised (later on May 28)* that the Commission "would

* Erroneously stated by the Circuit Court of Appeals as May 29 (R. p. 37).

forthwith issue a requisition order and take possession of the vessels unless the Company agreed to take all steps necessary to make the ships available for the Navy not later than Monday morning, June 2, 1941, and that they desired them at the earliest possible moment" (R. p. 14).

On May 28, 1941,* while petitioner's representative was in Washington as above set forth, petitioner had engaged the respondents in New York as members of the *Quirigua* crew for a round voyage from New York to Central and South American ports, shipping articles being signed before a shipping commissioner which specified the monthly wages of each respondent (R. pp. 12, 33).

Subsequently petitioner's representative instructed petitioner's proper officers to prepare the *Quirigua* and the *Chiriqui* for delivery to the Navy at the earliest possible moment (R. p. 14), and petitioner advised the Maritime Commission by letters dated May 29 (R. pp. 16-17) that, having been informed by the Commission that the national defense required the Navy Department immediately to acquire the use of the vessels *Quirigua* and *Chiriqui* all existing arrangements for the vessels would be cancelled and the vessels delivered as demanded, notwithstanding that they both were already booked to their full cargo and passenger capacity (R. pp. 16-17).

On May 29, respondent, because of the aforesaid requisition, discharged petitioners, paying them their wages earned up to the time of discharge (R. p. 12).

On May 31 the *Quirigua* was tendered, and on June 2 was delivered, to the Navy pursuant to the aforesaid requisition (R. p. 14).

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* Erroneously stated by the Circuit Court of Appeals as May 29 (R. p. 37) but correctly stated at R. p. 38.

FIRST POINT

The District Court decision, left uncorrected by the Circuit Court of Appeals, is in conflict with this Court's construction of Section 594, Title 46, U. S. Code.

In the Circuit Court of Appeals both sides contended that recovery under Section 594 constitutes recovery of liquidating damages as for breach of contract, and not recovery of a penalty. Such position is sound in view of numerous authorities to effect that the parties must be assumed to have contracted with reference to the statute. *The Steel Trader* (*United States Steel Products Co.* v. *Adams*), 275 U. S. 388, 390; *Calvin* v. *Huntley,* 178 Mass. 29; *Arwine* v. *Alaska S.S. Co.,* 189 Wash. 437, 65 P. (2d) 695.

Since the obligation of Section 594 as concerns extra wages must be regarded as contractual, the owner should be entitled to assert against seamen's claims thereunder any defense—including the defense of impossibility—ordinarily available to excuse contractual performance.

The District Court decided that respondents were entitled to one month's wages regardless of whether or not their discharge was "improper", i.e., whether or not the shipowner had a legal defense excusing further performance (R. p. 20). The Court relied on a statement of legislative intent by one Conger, quoted in *The Steel Trader,* 275 U. S. 388 (R. p. 19), who in reporting the bill to the House of Representatives said:

> "The bill is substantially the Shipping-Commissioner's Act of England [The British Merchant Shipping Act of 1854] with such changes as have been deemed necessary to adapt it to this country * * *" (p. 390).

The British Act provides as follows:

> "Sec. 167. Any seaman who has signed an agreement, and is afterwards discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage thereby caused to him, not exceeding one month's wages, and may, on adducing such evidence as the Court hearing the case deems satisfactory of his having been *so* improperly discharged *as aforesaid*, recover such compensation as if it were wages duly earned" (pp. 390-391). (Italics ours.)

For purposes of comparison the material differences between the British statute and Section 594 have been italicized.

The District Court recognized the difference between the two statutes, but stated that "The 'so' and the 'as aforesaid' can refer only to absence of fault and absence of consent on the part of the seaman" (R. p. 20), whereas petitioner's position is that omission of the words "so" and "as aforesaid" from Section 594 clearly indicated legislative intent to reach a different result and selection of words appropriate to accomplish such intent, namely, that a seaman's discharge must be "improper" in the sense of having been occasioned without the shipowner having any adequate legal defense therefor.

Section 594 is not ambiguous and should be given its plain meaning, especially in view of its legislative background above mentioned. The District Court gave the language of the statute a strained and illogical meaning where the need for such interpretation was entirely lacking. *People ex rel. Bockes* v. *Wemple*, 115 N. Y. 302, 308.

In *Hopkins* v. *Moore-McCormack Lines, Inc.*, 175 Misc. 109, affirmed 262 App. Div. (N. Y.) 722, the Court refused to rule as matter of law that a seaman, discharged prior to earning one month's wages without his consent or any fault on his part, was entitled to recover one month's wages under Section 594 against the defendant shipowner who had rendered further performance impossible by its voluntary compliance with the public policy of the United States concerning ship employment as expressed by the President's proclamation.

Florentine v. *Grace Line, Inc.*, 1942 A. M. C. 126 (App. Term, N. Y.), and *Jorgenson* v. *Standard Oil Company*, 1940 A. M. C. 1169 (Mun. Ct., N. Y.), affirmed without opinion 262 App. Div. (1st Dept.) 999, leave to appeal denied 263 App. Div. 708, certiorari denied 315 U. S. 819, relied on by respondents in the Circuit Court of Appeals, involved entirely different questions and are not in point.

The only decision which we have found that appears to be contrary to petitioner's contention is *The St. Paul*, 77 Fed. 998 (D. C., N. Y.),* where a break occurred in the main steam pipe leading to the port engine after the crew was signed on, which made the voyage impracticable (not impossible) and the crew was discharged after a three-day standby period. The District Court held that the crew members were entitled to recover under Section 4527 R. S. (now Sec. 594 of Title 46) even though it thought that "the discharge of the libelants under the circumstances was reasonable and justifiable * * * and except for the statute, probably no further wages or compensation could have been recovered by them" (p. 998). This view is only a dictum since the temporary breakdown would not furnish sufficient basis for a legally excusable discharge.

* Not relied on by respondents below.

The St. Paul was not appealed, and was cited in *Arwine* v. *Alaska S. S. Co.,* 189 Wash. 437, 440, as a case where the crew's discharge involved some element of fault on the part of the owner.

As against *The St. Paul* dictum, sound legal reasoning and the clear implication of this Court's decision in *The Steel Trader,* 275 U. S. 388, fully support petitioner's view that legal excuse for a seaman's discharge which would enable the shipowner to defend successfully a suit for breach of contract apart from Section 594, likewise precludes recovery of stipulated damages under Section 594.

In *The Steel Trader* this Court indicated very distinctly that recovery of one month's wages as stipulated in Section 594 was intended to constitute satisfaction for

> "all liability for breach of the contract of employment by wrongful discharge. The legislation was intended to afford seamen a simple, summary method of establishing and enforcing damages" (p. 390).

Surely the direct implication from such statement is that *wrongful discharge by the shipowner not legally excusable but rendering the owner liable for breach of the contract* is a condition precedent to seamen's recovery. This implication is further strengthened by the Court's explanation of the statutory declaration that the "one month's wages" shall constitute recovery *"as compensation"* upon the complaining seamen's "adducing evidence satisfactory to the court hearing the case, of having been improperly discharged":

> "The word *compensation,* in §4527 [Sec. 594], distinctly indicates that payment of a sum equal to one month's wages was intended to constitute the remedy for invasion of the seaman's right through breach of his contract of employment in the circumstances specified. 'Damages consist in compensation for loss sustained. * * * By the general system of our law, for

> every invasion of right there is a remedy, and that remedy is *compensation*. This compensation is furnished in the damages which are awarded.' Sedgwick's Damages, 9th Edition, Vol. 1, page 24. See also *Bauman* v. *Ross*, 167 U. S. 548" (p. 391).

Where, as here, the parties have stipulated that the requisition of the *Quirigua* was the sole cause of the seamen's discharge, and as matter of substantive law such supervening act excuses further performance of the contract on both sides (Point II), it is clear that there was no "invasion" of any seaman's rights "through breach of his contract of employment" and therefore no legal basis for "*compensation*" or damages.

The clear import of the caption of Section 594, "*Right to wages in case of improper discharge*", as well as the context of the section as above discussed, cannot properly be disregarded.

Since Section 594 is a statute of frequent application involving the rights of seamen and shipowners, and an important question of its construction has been decided erroneously by the District Court in a manner contrary to the decision of this Court in *The Steel Trader*, and left uncorrected by the Circuit Court of Appeals, petitioner's application for a writ of certiorari should be granted.

SECOND POINT

The decision below that the petitioner assumed the risk of the *Quirigua's* requisition, and that the requisition did not relieve petitioner from all further obligations under its employment contract with respondents, is in conflict with decisions of this Court, as well as of the Circuit Court of Appeals for the Second and Fourth Circuits.

Petitioner's submission to the requisition, May 29, 1941,* as confirmed to the Maritime Commission by petitioner's letters of that date (R. pp. 16-17), made impossible, and excused, further performance of its employment contract with respondents, who thereupon were discharged (R. p. 12).

The Circuit Court of Appeals affirmed the District Court's decree without finding it necessary to consider or pass upon the proper construction of Section 594 (Point I), on the ground that petitioner had assumed the risk of requisition and had failed to meet the burden of proving that "the requisition was an excuse for the breach" (R. p. 38). In so doing the Court disregarded the statement in the stipulation of facts that "the libellants were discharged by the respondent United Fruit Company for the sole reason that it had been required by the United States Maritime Commission to deliver the S.S. *Quirigua* to the United States Navy and therefore to cancel all existing arrangements for the scheduled sailing of the vessel in the circumstances set forth in the affidavit"

* Later formalized by execution of a requisition charter (R. pp. 14-15).

appearing in the Record, pp. 13-15, and overlooked the prevailing rule, well settled in this Court and elsewhere, that vessel requisition, when as here the cause of terminating contract obligations, constitutes commercial impossibility which provides the shipowner with adequate legal excuse or defense as regards subsequent non-performance. *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619; *Allanwilde Transport Corporation* v. *Vacuum Oil Co.*, 248 U. S. 377; *The Kronprinzessin Cecilie*, 244 U. S. 12; *Columbus Railway & Power Co.* v. *Columbus*, 249 U. S. 399; *The Claveresk*, 264 Fed. 276 (C. C. A. 2); *The Isle of Mull*, 278 Fed. 131 (C. C. A. 4); *W. J. Tatem, Limited* v. *Gamboa*, [1939] I. K. B. 132; *Bank Line, Limited* v. *Arthur Capel & Co*, [1919] A. C. 435, and other cases.

In *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619, this Court said:

> "It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it" (pp. 629-630).

Neither the President's proclamation, May 27, 1941, which authorized the Maritime Commission to requisition vessels for national defense purposes, nor the Commission's telephone message to petitioner in Boston the same day to effect that discussion in Washington was desired on

the question of delivery to the Navy for immediate use of two of petitioner's ships of the *Chiriqui-Quirigua* class, can properly be regarded as notice to the petitioner of the requisition of a particular ship of said class such as the *Quirigua*, which vessel, as petitioner's representative in Washington pointed out to the Commission on May 28, already had been fully booked with passengers and freight (R. pp. 13-14). Nor can the Washington conversations, May 28, properly be considered as an assumption by petitioner of the risk of requisition of the *Quirigua*. The words "these two vessels", "the vessels" and "said vessels" in the affidavit incorporated in the stipulation of facts (R. p. 14) were not intended to refer to the *Quirigua* (not in the United States May 27) or the *Chiriqui* (not in the United States until June 1), or to any two specific vessels, but merely to such two of "these ships" (i.e., the six ships) of the *Chiriqui-Quirigua* class as the Maritime Commission, at the Navy's request, would soon requisition when in the United States (R. p. 13). "Formal requisition" of the *Quirigua* was not "made on the 28th" as the Circuit Court of Appeals said (R. p. 38). It was not until May 29 that petitioner submitted to the Commission's general demand and itself allocated the *Quirigua* and the *Chiriqui* to the requisition (R. pp. 14, 16-17).

In the words of this Court in *Texas Co.* v. *Hogarth Shipping Co.*, as applied to the May 28 hiring of respondents by petitioner in New York,

> "The event apparently was not anticipated and there was no provision casting the risk on either party. Both assumed that the ship would remain available and that was the basis of their mutual engagements. These, we think, must be regarded as entered into on an implied condition that, if before the time for the voyage the ship was rendered unavailable by such a

> supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it" (p. 631).

That no facts competent to raise an issue as to assumption of risk were intended by the agreed statement (R. pp. 11-17) is shown by the absence of any contention in the courts below that there was any fault attributable to the petitioner in connection with its discharge of the respondents.

Certainly it cannot be urged with any validity that petitioner did not sustain the burden of proving that the requisition was an excuse for discharge of the respondents simply because the stipulation of facts did not specify what any Court was entitled to take judicial notice of—namely, the probability that under the existing circumstances the Navy's use of the *Quirigua* under requisition would extend beyond the short round voyage for which the respondents were signed on. *The Claveresk*, 264 Fed. 276, 282-283 (C. C. A. 2).

Petitioner's prompt submission on May 29 as regards the *Quirigua* to the requisition threatened "forthwith" by the Maritime Commission with respect to two of six similar ships at the Navy's insistence (R. p. 14), without waiting for the governmental lightning to strike, does not affect its right to avail of impossibility as an effectual defense. *The Claveresk*, 264 Fed. 276, 281-282 (C. C. A. 2); *Roxford Knitting Co.* v. *Moore-Tierney, Inc.*, 265 Fed. 177 (C. C. A. 2), cert. den. 253 U. S. 498; *Mawhinney* v. *Millbrook Woolen Mills*, 231 N. Y. 290; *Hopkins* v. *Moore-McCormack Lines, Inc.*, 175 Misc. 109, aff'd 262 App. Div. (N. Y.) 722.

We cannot believe that petitioner is to be penalized for not being a laggard, i.e., for not compelling the Com-

mission to issue a formal requisition order on May 29 or shortly thereafter, in which case the defense of impossibility unquestionably would have been available.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that an important statute relating to the rights of seamen may be properly administered, and that to such an end the writ of certiorari prayed for should be granted, that the decisions of the Circuit Court of Appeals and of the District Court be reversed, and that the libel be dismissed, with costs.

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NORMAN M. BARRON,
Counsel for Petitioner.

New York, N. Y.,
August 16, 1944.